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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 324

**HOME FURNITURE COMPANY, GEORGE H. PARK, AND
JAMES F. KILCREASE, ETC., APPELLANTS,**

vs.

**THE UNITED STATES OF AMERICA, THE INTERSTATE
COMMERCE COMMISSION, THE SOUTHERN PACIFIC
COMPANY, ET AL.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF TEXAS**

FILED MARCH 21, 1925

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[fol. a]

[Caption omitted]

[fol. 1] **IN UNITED STATES DISTRICT COURT, WESTERN
DISTRICT OF TEXAS, EL PASO DIVISION**

No. 146. In Equity

HOME FURNITURE COMPANY, a Copartnership, and GEORGE H. PARK and James F. Kilcrease, Individually and as Partners in Trade, Composing the Partnership of and Doing Business under the Firm Name and Style of Home Furniture Company, Plaintiffs,

versus

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, The Southern Pacific Company, a Corporation, and El Paso & Southwestern Railroad Company, a Corporation, Defendants.

BILL OF COMPLAINT—Filed Oct. 23, 1924

To the Honorable Judge of the District Court of the United States for the Western District of Texas, El Paso Division:

The Home Furniture Company, a co-partnership, and George H. Park and James F. Kilcrease, individually, and as partners in trade composing the partnership of and doing business under the firm name and style of Home Furniture Company, Plaintiffs above named, bring and file this their Petition and Bill of Complaint, acting by and through their attorneys and solicitors, Jos. U. Sweeney and Edward C. Wade, Jr., against the above named defendants, The United States of America, the Interstate Commerce Commission, The Southern Pacific Company, a corporation, and El Paso & Southwestern Railroad Company, a corporation, and complain and allege:

I

That the above named plaintiffs, George H. Park and James F. Kilcrease, are resident-citizens and tax payers of the City of El Paso, County of El Paso, and State of Texas, and reside within the Western [fol. 2] District of Texas, El Paso Division, and compose the partnership of Home Furniture Company, and they bring this suit individually and as partners in trade composing the partnership of and doing business under the firm name and style of Home Furniture Company, all hereinafter styled plaintiffs; that plaintiffs are and have been for several years last past engaged in the furniture business with their principal place of business at El Paso, Texas, and in connection with and as part of said business buy and sell new and second-hand furniture in different parts of the United States, including New Mexico and Arizona; that plaintiffs in connection with said business for several years last past have been and are now purchasing

furniture from business houses in Chicago, Illinois, and other cities in the eastern portion of the United States, and have caused said furniture to be shipped from said cities over the lines of the Chicago, Rock Island and Pacific Railroad and the lines of the El Paso & Southwestern Railroad to El Paso, Texas, for delivery to plaintiffs; that plaintiffs for several years last past have sold large quantities of furniture, both new and second-hand, and have shipped the same to customers in New Mexico, Arizona and West Texas, and in doing so have used the lines of the Southern Pacific and the El Paso & Southwestern Railway system; that plaintiffs are now engaged in the business of shipping furniture to Arizona, New Mexico and West Texas, and in using the lines of said railway systems for that purpose, and are engaged in shipping goods, wares and merchandise in interstate commerce.

II

That defendant, The Southern Pacific Company, is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and is authorized to and does operate railroads in the States of Oregon, California, Nevada, Utah, Arizona and New Mexico, and a line of steamships between the cities of Galveston, Texas, and New Orleans, Louisiana, and the City of New York, and is authorized to operate railroads in any other State of the United States, and is a carrier by railroad engaged in the transportation of passengers and [fol. 3] property subject to the Interstate Commerce Act.

III

That defendant El Paso & Southwestern Railroad Company is a corporation incorporated under the laws of the State of Arizona and is authorized to and does operate railroads in the State of Arizona, New Mexico and Texas; that said defendant is engaged in the transportation of passengers and property in interstate commerce subject to the Interstate Commerce Act; that defendant is part of what is known as the El Paso & Southwestern Railway System consisting of the following railroad companies, viz: The El Paso & Southwestern Railroad Company, the El Paso & Southwestern Railroad of Texas, the Burro Mountain Railroad Company, the Arizona & New Mexico Railway Company, the Dawson Railway Company, the El Paso & Northeastern Railway Company, the El Paso & Rock Island Railway Company, the Alamogordo & Sacramento Mountain Railway Company, the El Paso & Northeastern Railroad Company, and the Tucson, Phoenix & Tide Water Railway Company, hereinafter, for convenience sake, referred to as the Southwestern System; that all of the issued and outstanding capital stock and a portion of the outstanding bonds of the companies comprising said System are owned directly or indirectly by the El Paso & Southwestern Company, a holding corporation of the State of New Jersey; that of the railway companies comprising said system only the defendant El Paso & Southwestern Railroad Company is engaged in the transportation of passengers and property in interstate commerce, which said company,

in addition to operating the lines of railway owned by it, operates under lease all of the existing railways of the remaining companies comprising said system.

IV

That this is a suit of a civil nature in equity which arises under the Constitution and laws of the United States wherein the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars (\$3,000.00) and is brought to enjoin, set aside, annul, and suspend an order of the Interstate Commerce [fol. 4] Commission, one of the defendants above named.

V

That on or about July 1, 1924, defendants The Southern Pacific Company and El Paso & Southwestern Railroad Company, filed and caused to be filed with defendant, The Interstate Commerce Commission, an application or petition wherein and whereby said railroad corporations asked and sought an order of the Commission approving the proposal of The Southern Pacific Company to acquire control of the Southwestern System (a) by stock ownership through the acquisition by the Southern Pacific of all of the interests of the El Paso and Southwestern Company therein, in accordance with the terms of a certain agreement entered into between the said The Southern Pacific Company and the El Paso and Southwestern Company on the 20th day of June, 1924, a copy of which is hereto attached, marked Exhibit "A" and made a part hereof, to which reference is hereby made; and (b) by lease from the defendant El Paso & Southwestern Railroad Company to The Southern Pacific Company of the lines of railway owned by it for the period of one year from and after the first day of the month following the authorization of approval by said Commission, and thereafter until terminated by either party upon thirty (30) days' notice served upon the other (the said proposed term hereof being identical with the term of the existing leases to the El Paso & Southwestern Railroad Company, whereby the said railroad company operates the major portion of the railways comprising the Southwestern System not owned by it), and by assignment from the said defendant El Paso & Southwestern Railroad Company to The Southern Pacific Company of the leases whereby El Paso & Southwestern Railroad Company now operates the existing railways of the Southwestern System not owned by it, including the assignment of any and all trackage and operating rights over foreign lines;

That in and by said application and petition said defendant railroad corporation also asked the Commission for authority to issue [fol. 5] \$28,000,000 of common capital stock and \$29,400,000 of five per cent. twenty-year collateral trust bonds; and that by a separate application filed on the same date the Arizona and Eastern Railroad Company requested a certificate that the present and future public convenience and necessity require the construction by it of certain

new lines of railroad in the State of Arizona in connection with the main line of the Southern Pacific Railroad Company in said State of Arizona, the location of said new lines being delineated on the map hereto attached marked Exhibit "B" and made a part hereof, to which reference is hereby made;

VI

That the first of said applications was docketed as Finance Docket No. 4164 and the second of said applications covering the proposed construction of extensions and branch lines by the Arizona and Eastern Railroad Company was docketed as Finance Docket No. 4148; that divers persons filed protests with the said Commission against the granting of the first of said applications and petitions, including the Attorney General of Texas representing the State of Texas and the Railroad Commission of Texas, and the attorneys and solicitors appearing herein for these plaintiffs; that thereafter, to-wit: on September 8, 1924, a portion of said Commission known as Division 4, consisting of three Commissioners, to-wit: Commissioners Meyer, Eastman and Potter, proceeded to hold a hearing on said application.

VII

That the proceedings before said three Commissioners mentioned and referred to in the preceding paragraph hereof, finally culminated, terminated and resulted in a report of said Division, composed of said three Commissioners, two of said Commissioners, in effect, approving both of said applications and the authorization therein prayed for, and the third Commissioner dissenting from the report of the majority and finding in substance and effect that the authorization granted by the other two Commissioners was in violation of the letter [fol. 6] and the spirit of the law, and therefore in excess of the authority of the Commission; that as a result of said report and decision an order and certificate of said Division was made, dated the 30th day of September, A. D. 1924, in effect authorizing the acquisition of control by the Southern Pacific Company of the Southwestern System and the issuance of the stock and bonds prayed for and the construction of said extensions and branch lines; all of which will appear in and by the said report and the order based thereon, a copy of which is attached hereto marked Exhibit "C", to which reference is here made and by such reference made a part hereof, as fully and as completely as if set out herein in full.

VIII

That in and by said order it was provided that said order, including the certificate of necessity therein contained, should not become effective for a period of thirty days from the date thereof, that plaintiffs are informed and believe, and upon such information and belief allege the fact to be, that said defendant railroad companies claim, assert and contend that said report, decision, order and certificate

are and constitute ample and complete authority to them for the acquisition by The Southern Pacific Company of the control and ownership of the Southwestern System, the issuance of the stocks and bonds referred to, and the construction of the extensions and branch lines, and said corporations are about to proceed to carry out the terms of said agreement of June 20, 1924 (Exhibit "A") and to consolidate the Southwestern System with The Southern Pacific Company and the Southern Pacific System, thereby consolidating such carriers into a single system for ownership and operation, and will do so unless restrained and enjoined by the process of this court, to the great and irreparable loss and damage of plaintiffs, as hereinafter particularly alleged.

IX

That the total operated track mileage of the Southwestern System, all of which is operated by the defendant, El Paso & Southwestern [fol. 7] Railroad Company, as aforesaid, is 1139.9 miles, included wherein are 59.87 miles of railroad owned by the Chicago, Rock Island & Pacific Railway Company between Tucumcari, New Mexico, and Santa Rosa, New Mexico, and 32.27 miles of railroad owned by the Atchison, Topeka and Santa Fe Railway Company between Whitney Junction, New Mexico, and Burro Mountain Junction, New Mexico, operated by said El Paso & Southwestern Railroad Company; that the principal termini of the operated lines of the Southwestern System are Dawson, New Mexico, Tucson, Arizona, and Clifton, Arizona; that the principal termini of the owned lines of the Southwestern System are Dawson, New Mexico, Tucumcari, New Mexico, Santa Rosa, New Mexico, Clifton, Arizona, and Tucumcari, New Mexico; the exact location of said lines composing said Southwestern System being better described by delineation on the map hereto attached, marked Exhibit "B," to which reference is hereby made.

That the Southern Pacific System comprises, among others, lines of railroad running from points in Texas, to the City of El Paso, Texas, through said City of El Paso, Texas, in a generally easterly and westerly direction, and thence from said City of El Paso to and through Southern New Mexico, Southern Arizona, Southern California and thence to the City of Los Angeles, California, and other cities in California; that said system is owned and controlled either directly or indirectly by the defendant Southern Pacific Company; that said two systems parallel each other through and across the City of El Paso, Texas, and between the City of El Paso, Texas, and Tucson, Arizona, and the common points west of El Paso, Texas, are, among others, Deming and Lordsburg, New Mexico, and Kelton, Fairbanks, Benson and Tucson, Arizona, and said systems have been and are now in competition with each other for passenger and freight traffic of a transcontinental as well as of a local nature; that said systems between El Paso, Texas, and Tucson, Arizona, are parallel and competing lines of railroad within the meaning usually and customarily ascribed to those terms;—all of which will more fully appear by an inspection of the map hereto attached, marked Exhibit "B," and made

a part hereof, to which reference is hereby made; that said two lines [fol. 8] of railroad serve both Southern New Mexico and Southern Arizona, as well as the rapidly growing City of El Paso, Texas, a jobbing and shipping center, of developing proportions, now having a population of more than eighty thousand people; that because of the competition existing between the two systems the rivalry between them has been and is keen, and as a consequence the public has had better service for both passenger and freight traffic; that as a result of said competition, and as an outgrowth thereof, both lines of railroad have been active in solicitation of business for and through the sections traversed by their lines, at points in the East, and at all points between and including Chicago and Los Angeles, and at such intermediate places as El Paso, Texas, Tucson, Arizona, Deming and Lordsburg, New Mexico; that in order to secure and hold said business both lines of railroad have endeavored to give the maximum service and have advertised extensively and aided in upbuilding and promoting the principal communities on their lines, including the City of El Paso, Texas; that said competition has worked a gradual improvement in the treatment by both lines of the public and their practice, rules and regulations in regard to their methods of doing business, and it has facilitated the prompt handling of claims by shippers; that the Southwestern System originates a rich traffic for which both the Rock Island Railroad and the Southern Pacific compete eastbound, and it is that section parallel to the Southern Pacific as far as Tucson which originates a great deal of lucrative business; that the El Paso & Southwestern System was built for the purpose of bringing about competition in rates and service with the Southern Pacific System, and plaintiffs are informed and believe that as a resultant reduction in rates through the construction of said El Paso & Southwestern Railroad, said line of railroad was practically paid for within five years after its construction through savings in freight charges; that the said application of the Southern Pacific Company to the Interstate Commerce Commission had and has for its primary purpose the absorption by the Southern Pacific System of the Southwestern System, in order that conditions may be restored as near as may be before the construction of the Southwestern System and for the purpose [fol. 9] of suppressing the competition and rivalry that exists between the two systems, as aforesaid, to the end that said Southern Pacific may obtain a complete monopoly of the freight and passenger business to and through Southern New Mexico and Southern Arizona and for the purpose of depriving shippers and others of the privilege of shipping and traveling over one of two competing lines of railroad at their option.

XI

That for many years last past the defendant El Paso & Southwestern Railroad Company has maintained and now maintains its general offices at El Paso, Texas, as well as shops for the proper maintenance of its railroad lines; that in connection with said gen-

eral offices and said shops said defendant employs and furnishes employment to several hundreds of men and women who because of said employment are enabled to live in and about El Paso, Texas, and to support themselves and their families and those dependent upon them, which adds substantially to the population of the City of El Paso and puts in general circulation many thousands of dollars, all of which adds to the material happiness and prosperity of the community and increases the value of real and personal property, and consequently assists business enterprises within the city; that the Southern Pacific System likewise maintains shops at El Paso, Texas, but its general offices are at San Francisco, California, and if the two systems are fused into one it is the purpose of the defendant Southern Pacific Company, as plaintiffs are informed and believe, to consolidate the two shops into one and to either let many men out of employment or to remove them to other places, and to remove said general offices now maintained by the Southwestern to San Francisco or other points, thereby either depriving many persons of employment or removing them to other places, to the detriment of the community, as well as to those living in El Paso, Texas, and having business enterprises therein, including these plaintiffs.

[fol. 10]

XII

That plaintiffs, because of the nature of their business, have for several years last past sold, and are now selling furniture and goods, wares and merchandise to those dependent upon salaries paid by said El Paso & Southwestern Railroad Company to their employees, and if said consolidation and fusion is permitted they will be greatly injured by the loss of customers due to their, or those upon whom they are dependent, being deprived of their positions or because they are moved to other points; that if said consolidation, merger and fusion of said two systems takes place plaintiffs will also be greatly damaged and injured in their business and property by the loss to the general prosperity of the community, of which they are a part, due to the letting of men out of employment and the removal of other- with their families to distant places and the reduction in population that will necessarily ensue, and because of the decrease in the amount of expenditures in the community, which expenditures have heretofore contributed either directly or indirectly to the success of plaintiffs' said business;

That plaintiffs for several years last past have had and now have the option and right of routing their furniture purchased and sold, by way of the Southwestern System or the Southern Pacific System, and particularly with reference to shipments of furniture going from El Paso, Texas, to Southern New Mexico and to Southern Arizona, a privilege and right substantial and pecuniary value to plaintiffs, and if said merger is permitted to take place plaintiffs will be deprived of this privilege, right and option and will be compelled to ship over the Southern Pacific System alone, to the damage and injury of these plaintiffs; that plaintiffs, because of the com-

petition and rivalry existing between the two systems, have, along with the general public, had better service from said railroads and better treatment and will continue to have if said merger is not consummated, and plaintiffs allege that if said consolidation and merger is permitted that they and their business will be greatly injured and damaged by the depreciation in service and the increase in [fol. 11] rates and the laxity in handling of claims and traffic that is the natural result of the suppression of competition and the growth of monopoly; that if said merger is consummated, because of the consequent decrease in the population of the City of El Paso and the cutting down of the amount of money heretofore placed in circulation, property, both real and personal, belonging to plaintiffs, including said business owned by plaintiffs in the City of El Paso, will be depreciated in value and cause plaintiffs great financial and pecuniary loss;

All to the great and irreparable loss and damage of plaintiffs.

XIII

Plaintiffs allege and show that the said two Commissioners in making and issuing said findings, order and certificate, exceeded the power and authority delegated to them by the Interstate Commerce Act and the Transportation Act of 1920, and erred as a matter of law in the following particulars, to-wit:

That said three Commissioners are not the Interstate Commerce Commission and do not constitute a majority thereof, and are not empowered by law to approve the said applications, or to issue said certificate, the power to act under the said Acts of Congress being vested in the Interstate Commerce Commission, and plaintiffs allege, upon information and belief, that the Interstate Commerce Commission has not passed upon said applications, but said findings, order, and certificate were made by two Commissioners assuming to act for and in the name of the Interstate Commerce Commission without any lawful authority to do so, and that the said order and certificate purporting to have been issued by the Commission, Division 4, is the order of the Division composed of said three Commissioners, only two of whom concurred in said order and certificate, the third dissenting, and that said two Commissioners were not authorized by Act of Congress to exercise the powers delegated by Congress, not to a division of the Commission, but to the whole Commission; and plaintiffs aver, upon information and belief, that said Commission had not acted upon the findings, order and certificate of said two Commissioners, and they are therefore advised and believe, and so charge [fol. 12] that said order, findings and certificate are null and void and confer no authority upon the defendant railroads to carry out their said agreement, consolidation, and merger, and the issuance of stocks and bonds and the construction of extensions and branch lines.

XIV

Plaintiffs further show that if said findings, order and certificate are the acts of the defendant The Interstate Commerce Commission, that said The Interstate Commerce Commission in making and issuing said order and certificate exceeded the power and authority vested in it by law or otherwise, and that said Commission erred as a matter of law in the following particulars, to-wit:

A. That said Commission has in effect, and over the protest of the Sovereign State of Texas and the Railroad Commission of Texas, who were acting, among others, for and on behalf of these plaintiffs and other tax payers and shippers similarly situated, endeavored to override the Constitution and Laws of the State of Texas and to enter an order in defiance of the Constitution and laws of the State of Texas, in this:

That Section 5 of Article X of the Constitution of the State of Texas reads as follows:

"Sec. 5. No railroad or other corporation, or the lessees, purchasers or managers of any railroad corporation, shall consolidate the stock, property or franchise of such corporation with, or lease or purchase the works or franchise of, or in any way control any railroad corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line."

That Section 6 of Article X of the Constitution of the State of Texas reads as follows:

"Sec. 6. No railroad company organized under the laws of this State shall consolidate by private or judicial sale or otherwise with any railroad company organized under the laws of any other State or of the United States."

That Articles 6604 and 6606, Revised Statutes of Texas, carry into effect said sections of the Constitution of Texas.

[fol. 13] That a portion of the Southwestern System included in the said order of the Commission lies between the City of El Paso and the middle of the Rio Grande River (the Texas-New Mexico boundary line) a distance of four miles, which portion is geographically parallel with that part of the Galveston, Harrisburg and San Antonio Railway extending likewise from El Paso to the Rio Grande River, which last road is a part of the Southern Pacific System, the said Galveston, Harrisburg and San Antonio Railway being controlled, either directly or indirectly, through ownership of its stock by the defendant Southern Pacific Company; that said four miles of railroad are a vital part of the two competing systems known as the Southwestern System and the Southern Pacific System, and said four miles of rail-

road are parallel and competing lines of railroad within the meaning of Section 5 of said Constitution.

That four miles of said railroad are owned by the El Paso and Southwestern Railroad Company of Texas, a Texas corporation, which is one of the corporations going to make up the Southwestern System, and under said order of the Commission the defendant Southern Pacific Company proposes to take over and acquire the stock of the said Texas corporation, thereby consolidating the Texas company, its stock, property and franchise, with the said Southern Pacific Company, a Kentucky corporation, in defiance of said sections of the Texas Constitution and the laws passed to carry same into effect, which said order is invalid and inoperative to authorize such a consolidation in violation of the said Constitution and laws.

That said order purports to authorize the defendant Southern Pacific Company to acquire the stock of that portion of the Southwestern System owned and controlled by the El Paso and Northeastern Railroad Company, a corporation organized under the laws of the State of Texas, consisting of about nineteen miles of railroad extending from the city of El Paso, Texas, to the Texas-New Mexico boundary line north of El Paso, thereby consolidating same with the Southern Pacific System, in violation of said sections of the Texas Constitution.

And plaintiffs here aver that the order of the Commission per-[fol. 14] mitting the acquisition by the Southern Pacific Company of the stock and control of the El Paso and Northeastern Railroad Company and the El Paso and Southwestern Railroad Company of Texas is null and void because in excess of the power of the Commission to override the Constitution and laws of the State of Texas.

B. That said Commission has in effect, by said order, endeavored to override the Constitution of the State of Kentucky and to permit the defendant Southern Pacific Railroad Company to acquire control of a parallel and competitive line of railroad, in violation of its charter powers, in this:

That section 201 of the Constitution of the State of Kentucky of 1891 reads as follows:

"Sec. 201. No railroad, telegraph, telephone, bridge or common carrier company shall consolidate its capital, stock, franchises, or property, or pool its earnings, in whole or in part, with any other railroad telegraph, telephone, bridge, or other carrier company owning a parallel or competing line or structure; or acquire by purchase, lease, or otherwise any parallel or competing line or structure or operate the same; nor shall any railroad company or other common carrier combine or make any contract with the owners of any vessel that leaves or makes port in this state or with any common carrier by which combination or contract the earnings of the one doing the carrying are to be shared by the other doing the carrying."

That said defendant Southern Pacific Company is a Kentucky corporation subject to said Constitution, and said provision, as plain-

tiffs are advised and believe, prohibits said defendant railroad corporation from consolidating or acquiring in the manner set forth in said order the Southwestern System, both a parallel and competing line and structure of railroad, and plaintiffs here charge that said order is null and void because in excess of the power and authority of the Commission, in that it is in defiance of said constitutional provision and violative of the charter powers of said defendant corporation, and an endeavor on the part of the Interstate Commerce Commission to deprive a sovereign State of its control of a corporation organized under the constitutional authority of the State.

C. That said Commission has in effect, by its said order exceeded its power and authority in endeavoring to permit an acquisition, consolidation and merger in violation of both the spirit and letter of [fol. 15] the Transportation Act of 1920, in this, that said Act provides that any authorization looking to the consolidation of the railway systems of the United States shall see that competition shall be preserved as fully as possible, whereas the said order of the Commission suppresses and stifles competition between the two systems in the manner hereinbefore fully set forth; and plaintiffs here charge that said order is null and void and of no effect because in violation of the plain intent and purpose of said Transportation Act of 1920 and contrary to the power and authority conferred upon said Commission under said Act.

D. That said Commission has in effect, by said order, endeavored to permit the consolidation of two systems of railroad under the terms of the Transportation Act of 1920, in advance of the complete plan of consolidation called for by said Act, which plan has not as yet been promulgated by the said Commission nor adopted by it; that said authorization in advance of the complete plan is premature and in excess of the power conferred upon it by Congress, and the said order is therefore null and void and of no effect because in violation of the law.

E. That said Commission in effect by said order has endeavored to permit the fusing of the two systems of railroad ostensibly under the terms of Paragraph 2 of Article 5 of the Transportation Act of 1920, which paragraph confers no power on the Commission to permit an acquisition by one carrier of the control of another carrier, either under a lease or by the purchase of stock in a manner involving the consolidation of such carriers into a single system for ownership and operation, and plaintiffs here charge that the acquisition approved by the Commission in said order is a consolidation of said carriers into a single system for ownership and operation within the meaning of said Paragraph 2 of Article 5 of said Act, and said order and said approval are in consequence null and void and of no effect, because in excess of the power and jurisdiction of the Commission.

And plaintiffs here allege and charge that the El Paso & Southwestern Railroad Company has made the following public announcement of the intent and purpose of said merger:

[fol. 16] "The E. P. & S. W. Railroad Company and the Southern Pacific Railroad Company have agreed upon a basis of merger of the two companies under which the El Paso and Southwestern lines of railroad in New Mexico and Arizona will be operated as Southern Pacific lines, and the great resources of that railroad organization will, in the future, become interested in the development of the resources of New Mexico.

"Under such arrangements, the present owners of the El Paso and Southwestern Company are to retain all of their mining and other interests in the Southwest, including the Dawson coal mines and also become the largest owners of stock of the Southern Pacific Company held in any one ownership, with simple representation upon the Board of Directors and the Executive Committee of that Company, in order to guarantee for themselves, and for the people of New Mexico, West Texas and Arizona, such railroad policy as will best conduce to the interests of all. This announcement is made by the Public Relations Department in order that the public may fully know the facts direct from us."

Which said announcement is in accord with the terms of the agreement between said systems, hereto attached, marked Exhibit "A," and made a part of this Bill of Complaint, which the plaintiffs here pray the Court to inspect.

And plaintiffs further charge that the said order endeavors to permit the consolidation of said carriers into a single system for ownership and operation, in this: that the Southern Pacific Company is to own 100 per cent of the shares of stock evidencing ownership of the Southwestern System, and in addition it is to become the lessee of the various parts of that system, so that their operations may be intermingled with its own for purposes of management and accounting and the two systems will to all intents and purposes be fused, and plaintiffs aver that it was not the intent of Congress that the Commission should permit the fusing of railroads in the fashion contemplated by said order prior to the adoption of the complete plan of the Commission, and that said order is contrary to both the spirit and the letter of the law, and therefore in excess of the power of the Commission.

F. That said Commission, in effect, by said order has endeavored to permit the fusing of two systems of railroad as a piece-meal consolidation, on the assumption that it is in conformity and in harmony with a general tentative plan of the Commission adopted under Paragraph 5 of Section 5 of the Transportation Act of 1920, [fol. 17] whereas no complete final plan for the consolidation of the railroads of the United States into a limited number of competitive systems has yet been adopted by said Commission and there is no authority in the Commission at the present time to approve a consolidation of two carriers in the manner contemplated by said order in advance of the complete plan, nor is there any authority in said Commission to approve such a consolidation based upon said tentative plan, nor to approve a consolidation which involves only a

part of one of the competitive systems set forth in said tentative plan, without authorizing a consolidation of all the parts of said system, and plaintiff here charges that said order is not in accordance or in harmony with any tentative plan of said Commission, and plaintiffs aver that they are advised and believe that said order is null and void and of no effect because in violation of the plain intent and purpose of the Transportation Act of 1920, and contrary to the power and authority conferred upon said Commission under said Act.

G. That said Commission, by said order, in effect has endeavored to permit the fusing of two railroad systems in violation of the plain intent and purpose of paragraph 2 of section 5 of the Transportation Act of 1920, in that the order permits the suppression and stifling of competition, whereas said paragraph 2 of Section 5 authorizes the acquisition of control by one carrier of another only in case and to the extent that it is necessary and possible, and plaintiffs here charge that the said order is null and void and of no effect because beyond the powers and authority of the Commission derived from Paragraph 2 of Section 5 of said Act, or otherwise, and because in violation of the spirit and letter of the entire Transportation Act of 1920 and the Constitution and laws of the United States.

H. That said Commission, in effect, by said order, has endeavored to permit the fusing of two systems or railroad in competition with each other, in violation of the terms of the so-called Clayton Anti-Trust Act and particularly in violation of Section 7 thereof, which forbids one corporation engaged in commerce from acquiring directly or indirectly the whole or any part of the stock or shares of capital of another corporation engaged in commerce, when the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tends to create a monopoly of any line of commerce, and plaintiffs aver that the acquisition authorized by said order substantially lessens competition between the two systems and said two defendant railway corporations and restrains commerce in the section served by said railroads and tends to create a monopoly of commerce, and plaintiffs therefore charge that said order is null and void and of no effect, and beyond the power and authority of the Commission.

I. That said order is null and void because not in the public interest, the public interest being declared by Constitutional and statutory enactments, Federal and State, in favor of the preservation of competition and against monopoly, said order tending to destroy competition and to foster monopoly and is therefore against public interest, notwithstanding the findings of the Commission to the contrary, and plaintiffs aver that said Commission erred in finding that said order was in the public interest, and plaintiffs further aver that said Commission was without power to enter said order

which suppresses competition, restrains trade and fosters monopoly, notwithstanding a finding that the acquisition approved is in the public interest.

J. That said order of said Commission is not authorized by any powers derived from the Constitution of the United States, in this, that it seeks to appropriate and does appropriate a corporation created by the State of Kentucky, to-wit: the Southern Pacific Company, and two corporations of the State of Texas, to-wit: the El Paso and Northeastern Railroad Company and the El Paso and Southwestern Railroad Company of Texas, to the purposes of the Interstate Commerce Commission, and to subject same to its jurisdiction, and to deprive the states creating the same of the control thereof, when in truth and in fact such power to so appropriate, if it exists at all, which is not admitted but denied, is possessed solely by the Congress of the United States, and which said power has not been and cannot be delegated by the said Congress of the United States.

K. That said order is arbitrary, illegal and void, and beyond the power and authority of said Commission to make, and violative of the contract and constitutional rights of plaintiffs, and deprives plaintiffs of property and rights without due process of law; that the same is unreasonable and confiscatory, contrary to the evidence submitted to said Commission, contrary to well-known facts of which the Commission was bound to take judicial notice, not supported or warranted by the evidence submitted to said Commission, and not based upon or supported by sufficient findings of fact by the Commission to authorize the said order.

XV

Notwithstanding the matters and things hereinbefore alleged, the defendants and each of them is, threatening to enforce the order complained of above, and unless restrained and enjoined by this Court will enforce said order, and defendant railroad companies will proceed on and after October 30, 1924, to consummate the said agreement marked Exhibit "A" hereto attached, and consolidate the two systems and carry out the terms of said order, to the great and irreparable damage of plaintiffs, as hereinabove alleged; that plaintiffs have no adequate remedy at law for the redress of the injuries to be inflicted upon them by the enforcement of the order aforesaid, and it is necessary to the adequate protection of plaintiffs that equity should intervene with the power of injunction, and that preliminary and permanent injunctions and temporary restraining orders be granted against the enforcement of the order above complained of, and the acquisition of control by one carrier of the other carrier referred to in said order.

XVI

That the State of Texas and the State of Kentucky have not authorized the proposed acquisition of control by said Southern Pacific Company of the Southwestern System, or any part thereof.

Wherefore, and inasmuch as plaintiffs have no plain, speedy and adequate remedy at law in the premises, plaintiffs pray:

First. That the Court grant unto plaintiffs their right of subpoena, directed to the defendants and each of them, requiring and commanding them and each of them at a certain time, and under a penalty to be therein specified, to be and appear before this Court and answer the matters in this Petition and Bill of Complaint set forth, but not under oath (an answer under oath being hereby expressly waived), and to stand and abide by and perform such orders, directions and decrees as shall be made herein.

Second. That this court find and decree that the said order of the Interstate Commerce Commission herein complained of is unwarranted, illegal and void, and that said order, insofar as it seeks to permit the acquisition by the Southern Pacific Company of the Southwestern System, be enjoined, set aside, annulled and suspended, and that the threatened action of said Southern Pacific Company in attempting to acquire the control of said Southwestern System be enjoined.

Third. That a restraining order and a preliminary or interlocutory injunction be granted, restraining and enjoining the defendants and each of them, their agents and representatives, and all persons acting through or under them, or any of them, pending this litigation, from enforcing or attempting to enforce the said order, or from taking any action looking to the carrying out of the said contract dated the 20th day of June, 1924 (Exhibit "A"), or from taking any action looking to the acquisition by the defendant Southern Pacific Company of the ownership or control of the Southwestern System.

Fourth. That at the conclusion of this litigation a final injunction be granted, permanently enjoining the enforcement of the said order of the Interstate Commerce Commission and enjoining the Southern Pacific Company from carrying out said contract, and from acquiring or taking over the ownership and control of the said Southwest-[fol. 21] ern System.

Fifth. That the plaintiffs have such other, further and additional relief as to this Court may seem equitable in the premises, together with costs of suit.

Home Furniture Company, a Copartnership, and George H. Park and James F. Kilcrease, Individually and as Partners in Trade, Doing Business under the Firm Name and Style of the Home Furniture Company, Plaintiffs, by Jos. U. Sweeney and Edward C. Wade, Jr., Attorneys and Solicitors for Plaintiffs. Jos. U. Sweeney and Edward C. Wade, Jr., El Paso, Texas, Solicitors for plaintiffs.

UNITED STATES OF AMERICA,
Western District of Texas,
El Paso Division:

Sworn to by George H. Park et al. Jurat omitted in printing.

[fol. 22] EXHIBIT "A" TO BILL OF COMPLAINT

Agreement made this 20th day of June, 1924, by and between El Paso & Southwestern Company, a corporation of the State of New Jersey, hereinafter called "Southwestern Company" and Southern Pacific Company, a corporation of the State of Kentucky, hereinafter called "the Southern," Witnesseth:

Southwestern Company owns all of the issued and outstanding capital stock of El Paso & Southwestern Railroad Company, a corporation of Arizona, hereinafter called "the Southwestern Railroad," of the Burro Mountain Railroad Company, a corporation of New Mexico, of the Arizona & New Mexico Railway Company, a corporation of New Mexico and Arizona, hereinafter called "the Arizona," and of the El Paso & Northeastern Company, a holding corporation of New Jersey, hereinafter called "the Northeastern Company." The Southwestern Railroad owns all of the issued and outstanding capital stock of the El Paso & Southwestern Railroad Company of Texas. The Northeastern Company owns all of the issued and outstanding capital stock of the El Paso & Rock Island Railway Company, a corporation of New Mexico, of the El Paso & Northeastern Railway Company, a corporation of New Mexico, of the Alamogordo & Sacramento Mountain Railway Company, a corporation of New Mexico, of the El Paso & Northeastern Railroad Company, a corporation of Texas and of the Dawson Railway & Coal Company, a holding company of New Jersey, hereinafter called "the Dawson." The Dawson owns all of the issued and outstanding capital stock of the Dawson Railway Company, a corporation of New Mexico. The Southwestern Company is also the legal and equitable owner of all of the issued and outstanding capital stock of the Tucson, Phoenix & Tide Water Railway Company, a corporation of Arizona, hereinafter called "the Tide Water," which owns certain real estate, franchises and rights of way in the City of Phoenix, Arizona, and [fol. 23] elsewhere, and of all of the issued and outstanding capital stock of the Nacozari Railroad Company, hereinafter called "the Nacozari," a New Jersey corporation, which owns and controls through stock ownership a certain railroad beginning at Agua Prieta, Mexico, and extending thence in a southerly direction to Nacozari, Mexico, together with certain lands and franchises in Guaymas, Mexico.

All of the railways and railway properties of all of the above-named corporations, other than the Tide Water and Nacozari, are now being operated by the Southwestern Railroad, and together constitute a system of railways reaching from Dawson, New Mexico, to Tucumcari,

New Mexico, and from Santa Rosa, New Mexico, to Tucson, Arizona, together with branch lines connecting therewith and reaching other points in the States of Arizona and New Mexico, in addition to which the Southwestern Railroad operates a line of railroad owned by the Chicago, Rock Island & Pacific Railway Company between Tucumcari, New Mexico, and Santa Rosa, New Mexico, under the terms of a certain operating contract between the Chicago, Rock Island & Pacific Railway Company and the New Mexico Railway & Coal Company (now the Northeastern Company), dated the 2nd day of May, 1907, the term whereof was extended by a supplemental agreement of June 1, 1920, now in process of assignment to the Southwestern Railroad, and which it is contemplated shall be assigned to the Southern upon consummation hereof. All of said railway properties so operated by the Southwestern Railroad, together with the properties of the Nacozari and the Tide Water, are hereinafter collectively called "the Southwestern System," and the several corporations above named, through the ownership of whose stock the Southwestern Company owns or controls said system are hereinafter collectively called "Southwestern Subsidiaries."

Southwestern Company is also the owner of First and Refunding Mortgage Bonds of the Southwestern Railroad of the face value of [fol. 24] \$5,055,000, of bonds of the Arizona of the face value of \$1,294,533, which have been tendered in exchange for First and Refunding Mortgage Bonds of the Southwestern Railroad in accordance with a certain Refunding plan approved by the Interstate Commerce Commission hereinafter called "the Commission," by an order entered by it on December 26, 1923, in Finance Docket 3135, and is entitled to receive First and Refunding Bonds of the Southwestern Railroad of the face value of \$2,048,000 in part payment for equipment transferred to the Southwestern Railroad, in accordance with said order and Refunding Plan. There are no other bonds or other evidences of funded indebtedness of the Southwestern Railroad. Bonds or other evidences of funded indebtedness of the Southwestern Subsidiaries are owned in part by the general public and in part by corporations comprising the Southwestern System.

It is the intended purpose and effect of this agreement that on the consummation thereof the Southern will have acquired all of the Southwestern Company's interest in the Southwestern System through the exchange of securities hereinafter provided, and all of the other assets of the Southwestern Company, whether specifically described above or not, including any property held in trust for it, and to effectuate such purpose and in consideration of the premises and of the mutual promises and agreements herein contained, the parties hereto agree as follows:

1. Subject to the approval of the Commission to be obtained as hereinafter provided, the Southwestern Company agrees to assign and transfer to the Southern all of said stocks, bonds and other securities of and all book accounts, claims against or other interest in Southwestern System now owned by or held in trust for the South-

western Company, and all other property of any kind whatsoever owned by — or held in trust for the Southwestern Company, in exchange for 280,000 shares of the common stock of the Southern of [fol. 25] the par value of \$100 each, to be issued at par and Collateral Trust Bonds of the Southern of the face value of \$29,400,000, to be issued at par, and the Southern agrees to accept the aforesaid stocks, bonds and other property and assets of the Southwestern Company, and to issue in exchange therefor its common stock and Collateral Trust Bonds in the amounts mentioned, and undertakes to take the necessary proceedings to create and to apply to the Commission for authority to issue said stock and bonds, and to apply to the New York Stock Exchange for listing thereon.

2. The Southwestern Company guarantees that there is no capital stock of Southwestern Subsidiaries outstanding in the hands of the general public, and that the outstanding bonds or other evidences of funded indebtedness of itself and of the Southwestern Subsidiaries in the hands of the general public do not exceed \$9,100,000, and if on the 30th day of April, 1924, the amount thereof was more or less than the foregoing sum, the stocks and bonds to be issued by the Southern hereunder shall be correspondingly decreased or increased, such decrease or increase to be divided equally between the stocks and bonds to be issued. It is further agreed that for the purposes of said adjustment bonds in the sinking fund of the Dawson are not to be considered as outstanding in the hands of the general public. The Southwestern Company also agrees that it and its subsidiaries will not sell, pledge or otherwise dispose of the stocks or bonds owned by them at the time of the execution of this agreement and generally described in the preamble hereof, except in connection with exchange of securities provided for by the Southwestern Refunding Plan.

3. To the extent that exchange of securities under the Southwestern Refunding Plan shall have been accomplished prior to the date of transfer of securities, as hereinafter provided, securities received by the Southwestern Company in such exchange shall be delivered by it [fol. 26] to the Southern, and received by the latter in lieu of the securities for which exchanged.

4. The aforesaid Collateral Trust Bonds shall be issued in denominations of \$1,000, shall be dated the first day of May, 1924, shall mature the first day of May, 1944, shall bear interest at five per cent (5%), payable semi-annually, shall be redeemable on any semi-annual interest date at par and accrued interest on ninety (90) days' notice, shall be issued under a Trust Indenture in form approved by counsel of Southwestern Company, and shall be secured by a pledge with the trustee thereunder of collateral securities to be agreed upon by the parties hereto as soon as possible. In case the parties hereto cannot agree upon the value or class of collateral to be deposited under the trust indenture, it is agreed that collateral shall be selected from the statement of collateral, as shown in Exhibit 1, hereto attached, which shall be submitted to a board of independent bond experts (one to be chosen by the Southern, one by the Southwestern

Company, and, in the event of disagreement, the two so selected to choose a third member), whose opinion as to the value and class of collateral to be originally deposited under the trust indenture shall be final and shall be accepted by both sides. It is understood that not more than fifty per cent (50%) of the collateral under the trust indenture at any time shall be in any one security; that the total collateral, whether original or substituted, shall at the time of submission to the mortgage be of a fair or appraised value at least twenty-five per cent (25%) in excess of the face value of the aforesaid collateral trust bonds issued and outstanding; and that collateral substituted for collateral previously deposited shall be of a fair or appraised value at least equal to the last previously appraised value of the securities to be withdrawn. So long as there shall be no default in the payment of the principal or interest of any of the said Collateral Trust Bonds, the Southern shall be entitled (1) to receive all interest paid on any of the pledged securities, and (2) to withdraw any of the pledged securities and to substitute therefor other securities of at least equal value.

5. The Southern accepts as a fact the representation of the Southwestern Company that the property of the Dawson Fuel Company, the stock and bonds of which of the face value of \$1,000,000 each are pledged among other collateral as security for the mortgage bonds of the Dawson, was transferred to Stag Canon Fuel Company, a subsidiary of Phelps-Dodge Corporation, a New York corporation, on or about the 15th day of April, 1908. It is further understood that under the terms of the amortization clause of the mortgage of the Dawson it is provided that a royalty of 5c. per ton shall be paid by or on behalf of the Dawson Fuel Company annually for the creation of a sinking fund for the retirement of said Dawson bonds, and that the interest on the bonds purchased and held in the sinking fund shall likewise be applied to said amortization. It is understood and agreed that until amortized through sinking fund payments the said bonds of the Dawson shall not be cancelled or retired, and the Southwestern Company guarantees that the royalty payments hereinbefore described shall be made by Stag Canon Fuel Company or such other company as may own or operate the said Fuel Company, and agrees to cause to be executed in form satisfactory to counsel for the Southern any agreements or contracts by and between the Stag Canon Fuel Company or such other owner or operator of said Fuel properties, and the Dawson, necessary to effectuate such purpose. It is understood and agreed that upon the conclusion of the amortization of the said Dawson bonds the stock and bonds of the Dawson Fuel Company shall be delivered to Phelps-Dodge Corporation, the present owner of said Dawson Fuel Company properties, or to its nominee. [fol. 28] It is likewise understood and agreed that upon retirement of the now outstanding bonds of the New Mexico Railway & Coal Company, the stocks and bonds of the New Mexico Fuel Company pledged thereunder as security shall be delivered to Phelps-Dodge Corporation or to its nominee.

6. The Southern will as soon as practicable after the execution of this agreement prepare and file with the Commission an application for authority to acquire control of the Southwestern System, in accordance with this agreement, and will diligently prosecute the same, and the Southwestern Company will render any assistance requested by the Southern in connection with said application and co-operative with it in securing favorable action thereon. It being the intention of the Southern to operate the railroads now operated by the Southwestern Railroad in the name of the Southern as lessee, the Southwestern Company will cause all necessary corporate action to be taken by the Southwestern Subsidiaries either for the assignment to the Southern of the existing leases to the Southwestern Railroad or for the execution of new leases to the Southern at the election of the Southern, in order to enable the Southern to include in its application to the Commission for acquisition of control an application for authority to operate the railways of the Southwestern System in its own name as lessee, and to carry said leasing plan into effect if authorized by the Commission.

7. Pending final consummation of this agreement the Southwestern System shall continue to be operated by its present organization. During said period of operation the operation of said properties will be conducted in a normal and efficient manner and will be fully maintained in accordance with and up to the Southwestern Company's standard; no unusual or long-term contracts shall be made without the approval of the Chairman of the Executive Committee of the Southern; no expenditures for new equipment or additions and [fol. 29] betterments in excess of Fifty Thousand Dollars (\$50,000) for any single job or purchase shall be made without the approval of said Chairman, except that the Southern accepts the fact that three (3) baggage buffet cars, one (1) dining car, six (6) mountain type locomotives and four hundred (400) fifty-ton box cars have been ordered for delivery after July first in addition to which two steel club cars are being converted into dining cars, all at an aggregate cost of \$1,683,000, to the delivery and completion of which the Southern agrees without further approval of said Chairman. Any funds required to maintain operations and make necessary additions and betterments including said equipment will be provided by the Southern. Any such advances by the Southern will be returned to it promptly with interest at six per cent (6%) per annum, in the event that this agreement is terminated by reason of the failure of the Commission to render a satisfactory order of authorization and approval as hereinafter defined.

8. Upon consummation hereof the Southwestern Company agrees that the directors and officers of the Southwestern Subsidiaries shall submit their resignations, to take effect at the option of the Southern.

9. The Southern accepts the fact that under the authority of an order of the Commission dated December 26, 1923, the Southwestern Company was authorized to proceed with a refunding of the obligations of the Company and of its subsidiaries and the simplification

of stock ownership, and, further, that the Southwestern Company is now engaged in said refunding operations. The Southern agrees that the Southwestern Company may carry out said Refunding Plan pending transfer of securities hereunder. Any substantial deviation therefrom pending consummation of this agreement shall be approved in writing by both parties hereto.

10. Upon consummation hereof and exchange and transfer of securities the Southern will assume all outstanding pension obligations of the Southwestern Company or the Southwestern Subsidiaries towards employees then already pensioned, and will admit employees of the Southwestern System retained in the service of the Southern to the pension privileges of the Southern, in connection with which years of service with the Southwestern System shall count to the same extent as though performed upon the lines of the Southern.

11. Upon the making of an order by the Commission authorizing acquisition of control of the Southwestern System and operation under lease by the Southern, in accordance with the terms of this agreement, and with provisions, if any, which are in essential form and substance satisfactory to the Southern, the transfer and exchange of securities herein provided, including the cash and all other assets and accounts of the Southwestern Company, shall be effected with all convenient speed after said order shall have become effective, at the office of the Southern in New York City, and an accounting shall be had for the period beginning May 1, 1924, and ending on the last day of the month during which the said order becomes effective (said period being hereinafter referred to as the interim period) as follows:

(a) The accounts of the various companies composing the Southwestern System shall be kept during the entire interim period in accordance with the accounting regulations of the Commission and the usual and established accounting practices of the said companies;

(b) The Southwestern Company shall be credited with:

(1) An amount equal to one-half of the consolidated net income (determined as provided in paragraph (a) above, and classified according to Schedule 300-I in the form of annual report to the Commission) of the interim period, of the various companies composing [fol. 31] the Southwestern System, it being understood that all dividends paid or declared by the Southwestern Subsidiaries and other debits and credits to said income accounts during said period arising from inter-company transactions between the various companies composing the Southwestern System, such as rentals for leased lines and equipment, interest on bonds, etc., will be included in determining the amount of the said net income of the Southwestern System of the interim period;

(2) One-half of the face amount of all coupons detached from the said Southern Collateral Trust Bonds that matured during the

interim period, plus one-half of the interest accruing to the close of the interim period on coupons attached to the said bonds; and

(3) One-half of the interest on \$28,000,000, representing the par value of 280,000 shares of stock of the Southern delivered to the Southwestern Company, from May 1, 1924, to the close of the interim period, at the same rate or rates per cent. per annum as paid on the outstanding capital stock of the Southern and applicable to the same period, with proper adjustment for full interest and/or dividends thereafter, or for dividends, if any, accruing during the interim period on the stock delivered to the Southwestern Company, it being understood that, for the purposes of said accounting, dividends accrue ratably over the three months period ending with the close of the month next preceding the month in which such dividends are paid.

(c) The Southwestern Company shall be debited with:

(1) The amount of dividends (which shall not exceed 7% per annum) paid or declared during the interim period on the stock of the Southwestern Company;

(2) The full amount of interest accruing to close of the interim [fol. 32] period on unmatured coupons attached to the Southern Collateral Trust Bonds delivered in exchange for the property and securities of the Southwestern Company.

Payment of the net balance due from either party to the other, as determined by said accounting, shall be made by it in cash promptly upon completion of said accounting.

12. In the event that the Commission shall not approve the acquisition of control hereby contemplated by an order as defined in paragraph 11 hereof, this agreement shall terminate.

In witness whereof the parties have caused this agreement to be signed by their proper officers thereunto duly authorized and their respective corporate seals to be hereunto affixed and attached by their respective Secretaries or Assistant Secretaries the day and year first above written. Executed in triplicate.

El Paso & Southwestern Company, H. N., G. N., by T. M. Schumacher, President. Attest: George Notman, Secretary. (Seal.) Southern Pacific Company, by J. Kruttschnitt, Chairman of Executive Committee. Attest: Hugh Neill, Secretary. (Seal.)

EXHIBIT "B"

Southern Pacific Company

Map of El Paso & Southwestern System to be Merged with Southern Pacific Lines

(Said map omitted by stipulation of counsel.)

[fol. 33]

EXHIBIT "C" TO BILL OF COMPLAINT

INTERSTATE COMMERCE COMMISSION

Finance Docket, No. 4164*

CONTROL OF EL PASO & SOUTHWESTERN SYSTEM AND SECURITIES
ISSUE BY SOUTHERN PACIFIC

Submitted September 29, 1924. Decided September 30, 1924

1. Certificate issued authorizing the Arizona Eastern Railroad Company to construct, as extensions of its existing lines of railroad, a line of railroad in Maricopa and Yuma Counties, and a line of railroad in Pinal and Maricopa Counties, together with a branch in Pinal County, all in the State of Arizona.

2. Acquisition by the Southern Pacific Company of control of the carriers comprising the El Paso & Southwestern System by stock ownership through purchase of the interest of the El Paso & Southwestern Company therein and by lease approved and authorized, subject to certain conditions.

3. Authority granted to the Southern Pacific Company to issue not exceeding \$28,000,000 of its common capital stock and not exceeding \$29,400,000 of 5 per cent 20-year collateral trust bonds in payment for the interest of the El Paso & Southwestern Company in the companies comprising the El Paso & Southwestern System and in the Nacozari Railroad Company.

4. Request of Arizona Eastern Railroad Company for permission to retain excess earnings denied.

J. P. Blair, William F. Herrin, Cravath, Henderson & de Gersdorff, [fol. 34] L. J. Spence and Fred H. Wood for Southern Pacific Company and Arizona Eastern Railroad Company, applicants.

Clark & LaRoe, William Church Osborn, W. A. Hawkins, and Edgar E. Clark for El Paso & Southwestern Railroad Company, applicant, and for El Paso & Southwestern Company.

D. F. Johnson, Chairman, and Amos A. Betts, Commissioner, Arizona Corporation Commission, for Arizona Corporation Commission, intervenor.

Hugh H. Williams, Chairman, State Corporation Commission of New Mexico, and E. R. Wright for State Corporation of New Mexico, intervenor.

Alexander B. Baker for Governor of Arizona.

Kirke T. Moore for Tucson Chamber of Commerce, Deming Chamber of Commerce, Lordsburg Chamber of Commerce, and Douglas Chamber of Commerce and Mines; Kirke T. Moore and F. A. Jones for Southern Arizona Traffic Association; F. A. Jones and H. B. Wilkinson for Tidewater Main Line Association, Chamber of Commerce of Phoenix and town of Mesa; F. A. Jones for Ray Consolidated Copper Company; H. B. Wilkinson for town of Tempe; Alexander B. Baker and Louis B. Whitney for city of Phoenix; Alexander B. Baker for Salt River Valley Water Users Association; E. L. Green for Board of Supervisors of Pinal County, and Chamber of Commerce of Florence; Sam G. Bailie for town of Chandler, Chamber of Commerce of Chandler, and Gila Valley Unit of the Main Line Association; J. L. B. Alexander, for county of Maricopa; and P. G. Spilsbury for Arizona Industrial Congress, interveners.

This report also embraces Finance Docket No. 4148, Construction of Extensions and Branch Line by Arizona Eastern Railroad Company.

F. A. Jones and H. B. Wilkinson for Mesa Chamber of Commerce; F. A. Jones for Ray & Gila Valley Railroad Company; and E. L. Green for Casa Grande Chamber of Commerce.

[fol. 35] W. A. Keeling, Attorney General, Frank M. Kemp and R. E. Seagler, Assistant Attorneys General of the State of Texas, for State of Texas and Railroad Commission of Texas; Walter W. Page for Gilbert Chamber of Commerce; Andrew M. McDermott, in his own behalf, and Jos. U. Sweeney and Edward C. Wade, amici curiae, protestants.

Report of the Commission

Division 4, Commissioners Meyer, Eastman, and Potter

By Division 4:

By their joint application filed herein on July 1, 1924, the Southern Pacific Company and the El Paso & Southwestern Railroad Company, hereinafter called respectively the Southern Pacific and the Southwestern, carriers by railroad subject to the interstate commerce act, have applied under paragraph (2) of section 5 of the act for an order approving and authorizing acquisition by the Southern Pacific of control of the El Paso & Southwestern System, hereinafter called the Southwestern System, by stock ownership through purchase of the interest therein of the El Paso & Southwestern Company, hereinafter called the Southwestern Company, and by lease; and the Southern Pacific has applied under the provisions

of section 20a of the act for authority to issue \$28,000,000 of common capital stock and \$29,400,000 of 5 per cent 20-year collateral-trust bonds. By a separate application filed on the same date the Arizona Eastern Railroad Company, hereinafter called the Arizona, a common carrier by railroad subject to the act, has requested a certificate that the present and future public convenience and necessity require the construction by it (1) of a line of railroad from a connection with the main line of the Southern Pacific Railroad Company at or near Picacho, Pinal County, northerly to a crossing of the Gila River, thence northwesterly to a connection with [fol. 36] the Chandler branch of the Arizona at or near Chandler, Maricopa County, a distance of 50.5 miles, together with a branch connecting with the proposed line near Gila River and extending easterly to the city of Florence, a distance of 7 miles; and (2) a line of railroad extending from Hassayampa, Maricopa County, at the terminus of a branch of the Arizona, southwesterly to a connection with the main line of the Southern Pacific Railroad Company at or near Dome, Yuma County, a distance of 115 miles, all in the State of Arizona, the lines to be constructed as extensions of the existing lines of the Arizona. Permission is also requested under paragraph (18) of Section 15a of the act to retain the excess earnings from the proposed new lines of railroad for a period of 10 years.

The city of El Paso and the El Paso Freight Bureau filed an intervening petition protesting against acquisition by the Southern Pacific of control of the Southwestern System. This petition was subsequently withdrawn. The Attorney General of the State of Texas has filed a protest and certain representations with respect to the Texas companies embraced in the Southwestern System and has requested that any order entered by us be so conditioned as not to violate the provisions of the constitution and statutes of that State relating to consolidation of Texas companies with foreign corporations, the acquisition of control by one corporation of another corporation owning or having under its control a parallel or competing line, and the leasing of railroads of Texas corporations by foreign corporations. Protests were also filed by certain individuals. A hearing was held on September 8, 1924. None of the protestants was represented at the hearing, but intervening petitions in support of the applications were filed and appearances entered on behalf of the Arizona Corporation Commission, the State Corporation Commission of New Mexico, and a number of cities, towns, and commercial organizations of communities served by the applicants and representations in favor of granting the authority sought were made on behalf of the Governor of Arizona. Due consideration has been given the representations of the protestants.

The Southwestern System embraces the following railroad companies: the El Paso & Southwestern Railroad Company, the El Paso & Southwestern Railroad Company of Texas, the Burro Mountain Railroad Company, the Arizona & New Mexico Railway Company, the Dawson Railway Company, the El Paso & Northeastern Railway Company, the El Paso & Rock Island Railway Company, the Ala-

mogordo & Sacramento Mountain Railway Company, the El Paso & Northeastern Railroad Company and the Tucson, Phoenix & Tidewater Railroad Company. All of the issued and outstanding capital stock and a portion of the outstanding bonds of the companies embraced in the system are owned directly or indirectly by the Southwestern Company. Of the railroad companies of the System only the Southwestern is engaged in transportation of passengers and property in interstate commerce. This company in addition to operating its own lines, operates under lease all of the existing railways of the other Companies of the System.

The Tucson, Phoenix & Tidewater Railroad Company neither owns nor operates any line of railroad. Its property consists of certain real estate, franchises, and rights of way in the city of Phoenix, Ariz., and elsewhere. A description of the properties of the remaining companies embraced in the System, the interest of the Southwestern Company therein, and the inter-corporate relations existing between the various carrier and non-carrier companies comprising the System are set forth in our report in Control and Securities of E. P. & S. W. Subsidiaries, 86 I. C. C. 122. By our order entered December 26, 1923, in that proceeding we authorized the Southwestern Company to acquire direct control of certain of its subsidiaries, at that time controlled indirectly, and authorized the [fol. 38] Southwestern to acquire control of certain of the subsidiaries by purchase of stock and by lease and to issue securities in connection with such acquisition, in payment for certain equipment, and for the purpose of refunding obligations of other companies of the System.

The Southern Pacific proposes to acquire control of the Southwestern System (a) by stock ownership through purchase of the interest of the Southwestern Company therein pursuant to an agreement dated June 20, 1924, between the Southern Pacific and the Southwestern Company, a copy of which was filed with the application, and (b) by lease from the Southwestern of the lines of railroad owned by it and by assignment from the Southwestern to the Southern Pacific of the leases whereby the Southwestern now operates the existing railways of the Southwestern System not owned by it, including in the assignment any and all trackage and operating rights of the Southwestern over other lines. The provisions of the lease from the Southwestern to the Southern Pacific will be substantially the same as those of the leases approved and authorized in Control and Securities of E. P. & S. W. Subsidiaries, *supra*. Under the agreement dated June 20, 1924, the Southern Pacific will also acquire control of the Nacozari Railroad Company. This company is now controlled through stock ownership by the Southwestern Company, and owns and controls by stock ownership a railroad beginning at Agua Prieta, and extending thence southwesterly to Nacozari, together with certain lands and franchises in Guaymas, all in Mexico.

In payment for the interest of the Southwestern Company in the Southwestern System and in the Nacozari Railroad Company the

Southern Pacific proposes to issue at par \$28,000,000 of common capital stock consisting of 280,000 shares of the par value of \$100 each, and \$29,400,000, principal amount, of collateral-trust bonds.

The bonds are to be dated May 1, 1924, to mature May 1, 1944, [fol. 39] to bear interest at the rate of 5 per cent per annum, payable semiannually on May 1 and November 1 in each year, to be redeemable on any semiannual interest date at par and accrued interest on 90 days' notice to be issued under a trust indenture dated May 1, 1924, made by the Southern Pacific to the Hanover National Bank of the City of New York, trustee, and to be secured by pledge thereunder of the collateral securities described in the indenture. The common stock and collateral trust bonds are to be issued directly to the Southwestern Company in payment for its interest in the properties to be acquired.

The book value of the railway properties and other assets of the Southwestern System companies as of April 30, 1924, was \$71,086,202.39, and bonds of certain of the companies outstanding in the hands of the public amounted to \$9,098,000, making the net book value of the Southwestern Company's interest in the properties, \$61,988,202.39. The obligation to continue royalty payments to provide a sinking fund for retiring certain of the bonds is guaranteed by the Southwestern Company. The value of these royalty payments, said to be approximately \$1,000,000, will reduce by that amount the funded indebtedness of the Southwestern System companies and increase the book value of the properties to be acquired to approximately \$62,988,000. Upon the facts of record the consideration to be paid for the properties appears to be reasonable. Our tentative valuation of the properties has not been completed and nothing herein shall be construed as a determination of such value for rate making purposes.

The lines of the Southwestern System are intermediate between the lines of the Southern Pacific, and the lines of the Chicago, Rock Island & Pacific Railway System, hereinafter called the Rock Island. The lines of the three systems constitute one of the principal direct routes between southern California and the Missouri River and Chicago, and are included in the Southern Pacific-Rock Island System [fol. 40] in the grouping of railroads under the tentative plan for consolidation of railroad properties promulgated by us under date of August 3, 1921. Consolidation of Railroad Properties, 63 L. C. C. 455, Acquisition of control of the Southwestern System by the Southern Pacific is in harmony with this plan. It will result in direct physical connection between the lines of the Southern Pacific and the Rock Island, will assure the continuance of this route, and will increase its competitive strength as compared with the routes of the Santa Fe and Union Pacific. While the lines of the Southern Pacific and Southwestern System west of El Paso may be said to be parallel they serve different communities and industrial sections. The points at which the two systems meet are important points of interchange of a large traffic to and from communities served by one but not the other. Better coordination and more efficient and economical operation will follow as to this traffic and as to trans-

continental traffic in connection with the Rock Island, and relations to the traveling and shipping public and to public authorities will be simplified and improved.

The Southern Pacific has long had in contemplation double tracking its lines between Tucson and El Paso, the necessity for which appears to be now imminent. By acquiring the lines of the Southwestern System, the Southern Pacific will secure substantially all the advantages of double track operation on a more favorable location than would result from double tracking its existing line. This would be accomplished without any capital outlay for new construction. Moreover, the control sought will result in operating economies and make possible the unification of standards and practices. One of the principal economies to be effected by the proposed acquisition of control will be in the reduction of unbalanced traffic. In 1923 the excess of eastbound traffic over westbound on the Southern Pacific between Tucson and El Paso amounted to 90,362,000 gross ton-miles. During the same year on the Southwestern between the same points there was an excess of westbound traffic over eastbound of 70,335,000 gross ton-miles, making the unbalanced traffic under separate operation 160,697,000 gross ton-miles. Under merged operation, without any increase in train service, the unbalanced traffic would have amounted to only 20,627,000 gross ton-miles. The annual saving to be accomplished through better balancing of traffic is estimated at \$662,000. The annual saving in administration and operating expenses under unified operations is estimated at \$1,487,860, and in capital and maintenance charges through avoidance of double tracking between Tucson and El Paso at \$1,954,100, making a total estimated annual saving of \$3,430,950.

It is shown that the traffic on the existing main line of the Southern Pacific between Tucson and Yuma is so great that it will soon be impossible to handle it all on a single track. The proposed lines of the Arizona in connection with its existing lines would permit the diversion of part of this traffic over a new low grade route, would obviate the necessity of double tracking the existing route, would provide a shorter and more economical route for traffic to and from Phoenix, the Salt River Valley, the Ray-Hayden Mining District, and other points on the Phoenix division of the Arizona, and open new territory susceptible of agricultural and mining development. Construction of the proposed lines and control of the Southwestern System will give the Southern Pacific a second track or line from El Paso to Yuma, except between Picacho and Tucson, distance of 40 miles, and between Dome and Wendon, a distance of about 15 miles.

It is estimated that the reduction of curvature and grades on the new route, the lessening of interference with train movement, the reduced train and car mileage on traffic to and from points on the [fol. 42] Phoenix division, the avoidance of double tracking, and other advantages would result in an annual saving of \$902,630. The saving thus to be effected is equivalent to a return of 6.4 per cent per annum on the cost of constructing the new lines and im-

proving the existing lines, which is estimated at \$14,138,000. The net saving resulting from constructing the proposed lines rather than than double tracking the existing main lines of the Southern Pacific between Dome and Picacho is estimated at \$125,040 per annum.

The proposed lines are to be constructed by the Arizona but operated by the Southern Pacific under the proposed lease submitted to us in the matter of the application of the Southern Pacific Company to acquire control of the Arizona Eastern Railroad Company and the Phoenix & Eastern Railroad Company by lease, filed under Finance Docket No. 3340, now pending. The Southern Pacific owns practically all the capital stock of the Arizona. The estimated cost of constructing the proposed lines is \$12,752,060. The necessary funds for construction will be advanced by the Southern Pacific which is to be reimbursed by sale of first and refunding mortgage 5 per cent gold bonds of the Arizona, authority to issue which will be asked later. The Arizona proposes to begin construction of the proposed lines as soon as the certificate sought is obtained and to complete them with all reasonable dispatch. Our order authorizing the proposed acquisition of control of the Southwestern System by the Southern Pacific will be conditioned upon the construction of the proposed lines within the time fixed in our certificate.

Upon the facts presented we find:

1. That the public convenience and necessity require and will require the construction by the Arizona Eastern Railroad Company of the proposed lines of railroad in Pinal, Maricopa, and Yuma Counties, Ariz. described in the application filed under Finance [fol. 43] Docket No. 4148.

(2) That the acquisition by the Southern Pacific Company of control of the El Paso & Southwestern Railroad Company, the El Paso & Southwestern Railroad Company of Texas, the Burro Mountain Railroad Company, the Arizona & New Mexico Railway Company, the Dawson Railway Company, the El Paso & Northeastern Railway Company, the El Paso & Rock Island Railway Company, the Alamogordo & Sacramento Railway Company, the El Paso & Northeastern Railroad Company, and the Tucson, Phoenix & Tidewater Railroad Company by stock ownership and by lease as aforesaid will be in the public interest.

(3) That the proposed issue of \$28,000,000 of common capital stock and \$29,400,000 of 5 per cent 20-year collateral-trust bonds by the Southern Pacific Company as aforesaid (a) is for a lawful object within its corporate purposes and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by it of service to the public as a common carrier, and which will not impair its ability to perform that service; and (b) is reasonably necessary and appropriate for such purpose.

(4) That permission for the Arizona Eastern Railroad Company to retain the excess earnings from the proposed new construction should be denied.

An appropriate order and certificate will be entered.

EASTMAN, Commissioner, dissenting:

Under paragraph (2) of section 5 of the interstate commerce act we may authorize one carrier to acquire control of another in any manner "not involving consolidation of such carriers into a single system for ownership and operation." Under paragraph (6) of the same section we may authorize such consolidations, but only after we have adopted a general consolidation plan under the pro-[fol. 44] visions of paragraph (5). We are here asked to authorize an acquisition of control under paragraph (2). In my opinion, what is proposed is not such an acquisition of control as is contemplated by that paragraph, but is a consolidation of the carriers in question into a single system for ownership and operation. The Southern Pacific is to own 100 per cent of the shares of stock evidencing ownership of the El Paso & Southwestern system. In addition it is to become the lessee of the various parts of that system so that their operations may be intermingled with its own for purposes of management and accounting. Thereafter the two systems will, to all intents and purposes, be fused. It will in no way be easier to pry them apart than if there were a technical consolidation of the corporate entities. If this is not a consolidation of the carriers into a single system for ownership and operation within the meaning of paragraph (2), then the distinction which that paragraph attempts to make is utterly inconsequential. In my opinion, it was not the intent of Congress that we should permit the fusing of railroads in this irretrievable fashion prior to the adoption of our consolidation plan, and the action of the majority in this case is contrary to both the spirit and the letter of the law.

Certificate and Order

At a Session of the Interstate Commerce Commission, Division 4,
Held at Its Office, in Washington, D. C., on the 30th Day of
September, A. D. 1924

Finance Docket, No. 4164

Control of El Paso & Southwestern System and Securities issue by
SOUTHERN PACIFIC

Finance Docket, No. 4148

Construction of Extensions and Branch Line by ARIZONA EASTERN
RAILROAD COMPANY

[fol. 45] A hearing in these proceedings and investigation of the matters and things involved therein having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof;

It is hereby certified, That the present and future public convenience and necessity require and will require the construction

by the Arizona Eastern Railroad Company of the lines of railroad in Pinal, Maricopa, and Yuma Counties, Ariz., described in the application filed under Finance Docket No. 4148 and in the report aforesaid, said lines to be constructed as extensions of its existing lines: Provided, however, and this certificate is issued upon the express condition, that the construction of said lines shall be commenced on or before January 1, 1925, and completed on or before December 31, 1926, and that the Arizona Eastern Railroad Company shall report to this commission within 15 days thereafter the commencement and completion, respectively, of such construction.

It is ordered, That the Arizona Eastern Railroad Company, or its lessee, when filing schedule establishing rates and fares to and from points on said new lines of railroad, shall in such schedules make specific reference to this certificate by title, date, and docket number.

It is further ordered, That acquisition by the Southern Pacific Company of control of the El Paso & Southwestern Railroad Company, the El Paso & Southwestern Railroad Company of Texas, the Burro Mountain Railroad Company, the Arizona & New Mexico Railway Company, the Dawson Railway Company, the El Paso & Northeastern Railway Company, the El Paso & Rock Island Railway Company, the Alamogordo & Sacramento Mountain Railway Company, the El Paso & Northeastern Railroad Company, and the Tucson, Phoenix & Tidewater Railroad Company by stock ownership through purchase of the interest of the El Paso & Southwestern Company therein and by lease, as set forth in the application [fol. 46] recorded under Finance Docket No. 4164, and in the report aforesaid be, and it is hereby, approved and authorized: Provided, however, and the authorization herein given is upon the express condition, that the Arizona Eastern Railroad Company shall complete the construction of the proposed lines, the construction of which is authorized by the certificate of this commission herein, within the time fixed in said certificate; and provided further, That the Southern Pacific Company shall not sell, pledge or otherwise dispose of the capital stock of said companies, control of which is hereby authorized, or any part thereof, without the consent of this commission.

It is further ordered, That for the purpose of acquiring the interest of the El Paso & Southwestern Company in the companies comprising the El Paso & Southwestern System and in the Nacozari Railroad Company, the Southern Pacific Company be, and it is hereby authorized to issue (1) not exceeding \$28,000,000 of its common capital stock consisting of 280,000 shares of the par value of \$100, said stock to be represented by certificates substantially in the form submitted with the application; and (2) not exceeding \$29,400,000, principal amount, of collateral-trust bonds under and pursuant to, and to be secured by, a trust indenture dated May 1, 1924, made by the Southern Pacific Company to the Hanover National Bank of the City of New York, trustee; said bonds to be dated May 1, 1924, to bear interest at the rate of 5 per cent per annum, payable semiannually, on May 1 and November 1 in each year; to mature

May 1, 1944; to be redeemable on any semiannual interest date at par and accrued interest on 90 days' notice and to be secured by pledge with said trustee of the collateral securities described in said indenture; said stock and bonds to be issued at par and delivered to the El Paso & Southwestern Company in payment for its interest in [fol. 47] and to the securities and properties of the companies aforesaid.

It is further ordered, That, except as herein authorized, said stock and bonds shall not be sold, pledged, re-pledged, or otherwise disposed of by the applicant, the Southern Pacific Company, unless and until so ordered by this commission.

It is further ordered, That the Southern Pacific Company shall report concerning the issue of said stock and bonds in conformity with this commission's order dated July 22, 1924, respecting applications filed under section 20a of the interstate commerce act.

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said stock or dividends thereon or said bonds or interest thereon, on the part of the United States.

It is further ordered, That the request of the Arizona Eastern Railroad Company for permission to retain excess earning be, and it is hereby, denied.

And it is further ordered, That the certificate and order herein shall take effect and be in force from and after 30 days from the date thereof.

By the commission, division 4.

George B. McGinty, Secretary. (Seal.)

[File endorsement omitted.]

[fol. 48]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OF JUDGE COLIN NEBLETT DENYING COMPLAINANTS' ORAL MOTION TO CALL TWO OTHER JUDGES TO ASSIST—October 27, 1924

Be it remembered, That on this day was presented to the Court the original bill of complaint in this cause, and came on to be heard on the oral motion of the complainants, through E. C. Wade, Jr., Esquire, their solicitor, that this Court call to its assistance two other judges that the complainants may make an application to said three judges for an injunction suspending and restraining the enforcement, operation and execution of the order of the Interstate Commerce Commission, complained of in the complaint; and the Court, having heard said bill of complaint read and having heard the oral motion hereinabove referred to, together with counsel's argument thereon, and being fully advised in the premises, is of the opinion

that, it appearing from a reading of the complaint that the residence of the defendant The Southern Pacific Company, a corporation, is in the State of Kentucky, and the residence of the defendant The El Paso & Southwestern Railroad Company, a corporation, is in the State of Arizona, and the order sought by complainants to be [fol. 49] suspended, and its operation, execution and enforcement restrained, was granted by the Interstate Commerce Commission on the application of said two defendants, the venue of this suit being in the State of Arizona or in the State of Kentucky the Court is without jurisdiction to grant the application.

It is therefore ordered, adjudged and decreed by the Court that the motion of complainants be and the same is denied; to which ruling of the Court the complainants, through their attorneys, in open court excepted.

(Signed) Colin Neblett, United States District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PLEA TO JURISDICTION OF DEFENDANTS, SOUTHERN PACIFIC COMPANY AND EL PASO & SOUTHWESTERN RAILROAD COMPANY—Filed Nov. 15, 1924

Now come Southern Pacific Company and El Paso & Southwestern Railroad Company, parties defendant herein, and, appearing under protest for the purposes of this, their plea to the jurisdiction and to [fol. 50] the venue only and not appearing generally, represent and show to the Court:

That this Court has not jurisdiction of the alleged cause of action sought to be asserted in complainants' bill and that the venue of the suit upon said alleged cause of action does not lie in the District Court of the United States for the Western District of Texas, but, on the contrary, said venue lies, if this suit is maintainable at all, in the District Court of the United States for the District of Arizona or for the District of Kentucky, as complainants may elect to file their bill in either of said Districts, for the following reasons, to-wit:

Because it affirmatively appears from the face of complainants' Bill heretofore filed herein that Southern Pacific Company, a corporation of the State of Kentucky, having its domicile in said State of Kentucky, and El Paso & Southwestern Railroad Company, a corporation of the State of Arizona, having its domicile in the State of Arizona, were the parties upon whose petition the order of the Interstate Commerce Commission sought to be reviewed and set aside in this proceeding was made and because it further appears from the said bill of complainants that the said order relates to transportation and was made upon the petition of the parties aforesaid.

Premises Considered, defendants pray that this, their plea to the jurisdiction and to the venue be sustained and that the complainants' bill be dismissed.

(Signed) Baker, Botts, Parker & Garwood, J. H. Tallichet,
Kemp & Nagle, Solicitors for Defendants Aforesaid.

[File endorsement omitted.]

[fol. 51] IN UNITED STATES DISTRICT COURT

[Title omitted]

PLEA TO JURISDICTION OF DEFENDANTS, THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION—Filed Nov. 17, 1924

Now come The United States of America and the Interstate Commerce Commission, parties defendant herein, and, appearing under protest for the purposes of this, their plea to the jurisdiction and to the venue only and not appearing generally, represent and show to the Court:

That this Court has not jurisdiction of the alleged cause of action sought to be asserted in complainants' bill and that the venue of the suit upon said alleged cause of action does not lie in the District Court of the United States for the Western District of Texas, but, on the contrary, said venue lies, if the suit is maintainable at all, in the District Court of the United States for the District of Arizona or for the District of Kentucky, as complainants may elect to file their bill in either of said Districts, for the following reasons, to-wit:

Because it affirmatively appears from the fact of complainants' bill heretofore filed herein that Southern Pacific Company, a corporation of the State of Kentucky, having its domicile in said State [fol. 52] of Kentucky, and El Paso & Southwestern Railroad Company, a corporation of the State of Arizona, having its domicile in said State of Arizona, were the parties upon whose petition the order of the Interstate Commerce Commission sought to be reviewed and set aside in this proceeding was made and because it further appears from the said bill of complainants that the said order relates to transportation and was made upon the petition of the parties aforesaid.

Premises considered, defendants pray that this, their plea to the jurisdiction and to the venue be sustained and that the complainants' bill be dismissed.

(Signed) P. J. Farrell. P. J. Farrell, Solicitor for Interstate Commerce Commission; Blackburn Esterline. Blackburn Esterline, Assistant to Solicitor General of the United States; H. R. Gamble. H. R. Gamble, Special Assistant to United States Attorney, Solicitors for Defendants aforesaid.

[File endorsement omitted.]

[fol. 53]

IN UNITED STATES DISTRICT COURT

OPINION OF COURT ON APPLICATION TO ENJOIN AN ORDER OF THE
INTERSTATE COMMERCE COMMISSION—Filed Dec. 16, 1924

Sweeney & Wade, of El Paso, for Complainants;

H. R. Gamble, Special Assistant to the United States Attorney;
J. H. Tallichet, of Houston, Texas; Kemp & Nagle, of El Paso,
Texas; W. A. Hawkins, of El Paso, Texas, and Del W. Harrington,
of El Paso, Texas, for Defendants.

This bill was filed some time in October, 1924. At the time of its filing there was no Judge available in the El Paso Division, Judge Smith being deceased. On October 27th, 1924, it was presented to Judge Neblett, who was sitting by designation. After having considered the bill Judge Neblett entered the following order.

"Be it remembered, That on this day was presented to the Court the original bill of complaint in this cause, and came on to be heard on the oral motion of the complainants, through E. C. Wade, Jr., Esquire, their solicitor, that this Court call to its assistance two other judges that the complainants may make an application to said three judges for an injunction suspending and restraining the enforcement, operation and execution of the order of the Interstate Commerce Commission, complained of in the complaint; and the Court having heard said bill of complaint read and having heard the oral motion hereinabove referred to, together with counsel's argument thereon, and being fully advised in the premises, is of the opinion that, it appearing from a reading of the complaint that the residence of the defendant the Southern Pacific Company, a corporation, is in the State of Kentucky, and the residence of the defendant The El Paso & Southwestern Railroad Company, a corporation, is in the [fol. 54] State of Arizona, and the order sought by complainants to be suspended and its operation, execution and enforcement restrained, was granted by the Interstate Commerce Commission on the application of said two defendants, the venue of this suit being in the State of Arizona or in the State of Kentucky the Court is without jurisdiction to grant the application.

"It is therefore ordered, adjudged and decreed by the Court that the motion of complainants be and the same is denied; to which ruling of the court the complainants, through their attorneys, in open court excepted."

After the entry of the above order all of the defendants filed pleas to the jurisdiction.

Now, forty-eight days after the signing of the above order, the complainants again appear and ask that this Court call to his assistance a Circuit Judge and another District Judge to hear and rule such pleas.

The defendants suggest that they are not asking to have their pleas to the jurisdiction passed upon at this time; that at some more convenient date there may be available three Judges and at that time

action may be taken. The complainants, however, insist that the cause should be speeded to its ultimate conclusion.

The Commerce Court which was originally vested with the jurisdiction to pass upon the judgments of the Interstate Commerce Commission, was abolished on December 31st, 1913, and the jurisdiction was vested in District Courts. The Act provides "No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission, shall be issued or granted by any District Court of the United States, or by any Judge thereof, or by any Circuit Judge acting as a District Judge, unless the application for the same shall be presented to a Circuit or District [fol. 55] Judge, and shall be heard and determined by three Judges, of whom at least one shall be a Circuit Judge, and unless a majority of said three Judges shall concur in granting such application. When such application as aforesaid is presented to a Judge, he shall immediately call to his assistance to hear and determine the application two other judges."

The Act also provides that "The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited."

At what point—when—shall the one Judge call in the other two Judges? Is it imperative that he call them for every order and preliminary step that is taken in the shaping of the case prior to the hearing of the injunction feature? May one Judge determine, not upon the merits of the bill, but as to the parties, that there is no jurisdiction? Or must every step be taken before the entire Court as constituted in the statute?

Manifestly any proceeding or judgment or order which involves the merits of the bill; which touches the paramount policy that is and was back of the reason for the statute, must be considered by the assembled Judges that their combined wisdom may adjudge the difficulties.

That sentence of the statute which says that "Upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said Commission the same requirements as to Judges and the same procedure as to expedition and appeal shall apply," does not seem to refer to the consideration of preliminary questions.

While the provisions of Section 266 of the Judicial Code are somewhat different to the provisions of the statute under consideration, yet the reason of the legislation is approximately the same. The District Judge must call to his aid two other Federal Judges before there shall be an interlocutory injunction to restrain the enforcement [fol. 56] of a State statute on the ground of its alleged unconstitutionality. Judge Tuttle held in *Republic vs. Deland*, 275 F. 634, that he had the power to dispose of a motion to dismiss a bill which had been presented to him and which attacked the constitutionality of a State Act. In *Brown Drug Company vs. U. S.*, 235 F. 603, Circuit Judge Smith, sitting with two District Judges, in the consideration of a suit against the Interstate Commerce Commission

and certain carriers to prevent the enforcement of new rates, and where there was an application for a temporary injunction, held that a motion to dismiss could not be heard before the three Judges. That they were convened to hear the application for a temporary writ of injunction and not to determine whether the case should be dismissed upon its merits. "If the motion had been filed before the application had been made, there would be no pretense that these three Judges would sit to hear that question." Continuing, he said: "The motion to dismiss is one the majority of this Court think must be submitted to the District Judge alone and be determined by him. That motion is not entirely free from difficulty. It is alleged in the bill that no legal evidence was taken before the Interstate Commerce Commission which would confer jurisdiction on it in this matter. Some of the judges are inclined to the opinion that it stated a legal conclusion; some that it stated an ultimate fact to be determined by the District Court. Whether he will determine it today or not is no affair of this Court. When we come to the question as to whether the temporary injunction shall be granted or not the majority are agreed it cannot be done." See also *Yellow Pine vs. United States*, U. S. Supreme Court, December 1st, 1923.

The difficulty of the present situation, however, is that Judge Neblett, to whom the present bill was presented, and who was presiding at that time in this Court and whose decision and order this [fol. 57] Court has no authority or power to review, determined that this Court had no jurisdiction, and so determining declined to call two other Judges. Following such announcement and order all defendants filed the pleas mentioned. The defendants do not now call such pleas up for consideration, but all counsel ask for their consideration by three Judges. Therefore, notwithstanding my own views that it is quite possible that the District Judge may act upon such matters without asking the help of two other Judges, yet the delicacy of the present situation causes me to conform to the desire of counsel, and the case is set for hearing January 10th, 1925, at 11:00 A. M., at New Orleans, on pleas to the jurisdiction before three Judges.

(Signed) Wm. H. Atwell, District Judge.

[File endorsement omitted.]

In Equity Cause No. 146, Home Furniture Company vs. The United States, Interstate Commerce Commission, and Railways, an order will be drawn calling to my aid Honorable R. W. Walker, Presiding Justice of the United States Circuit Court of Appeals for the Fifth Circuit, and Honorable Du Val West, United States District Judge for the Western District of Texas, for a hearing of the above cause at New Orleans, Louisiana, at 11:00 o'clock on Saturday, January 10th, 1925.

(Signed) Wm. H. Atwell, United States District Judge.

[fol. 58]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OF JUDGE WM. H. ATWELL CALLING TO ASSISTANCE TWO
OTHER JUDGES AND SETTING CAUSE FOR HEARING—Filed Dec. 17,
1924

Be it remembered, That on this day there was presented to the Court the original bill of complaint herein by the Complainant, and the Complainant also called the attention of the Court to certain pleas to the jurisdiction filed by the defendants, the complainant appearing by its attorneys Joseph U. Sweeney, Esq., and Edward C. Wade, Jr., Esq., who moved, orally that the Court proceed to either pass upon said pleas to the jurisdiction so filed by the said defendants or to call to its assistance two other Judges to hear said pleas to the jurisdiction, and to set the case for early hearing; that the attorneys for the defendants did not present their please to the jurisdiction nor join in the request for an early hearing thereof, and, thereupon, the Court determined and found that said cause should have an early hearing and be speeded to adjudication, whereupon all counsel, representing all parties complainant and respondents, requested that the question of jurisdiction should be submitted to a court composed of three Judges, as provided by the statute in such case made and provided, and the Court having heard said counsel and being fully advised in said premises doth grant said motion and request in accordance with said agreement.

It is therefore ordered, adjudged and decreed by the Court that said motion and request be, and the same is, hereby, granted, and the Court doth hereby call to his aid Honorable Richard W. Walker, Senior Circuit Judge for the Fifth Circuit, and Honorable Du Val [fol. 59] West, District Judge for the Western District of Texas, and hereby sets the said cause for hearing on said pleas to the jurisdiction, and for such other purposes and procedure as under the law is necessary and required, at New Orleans, Louisiana, at 11:00 o'clock A. M., on Saturday, January 10th, 1925 and the Clerk of this Court shall transmit all papers herein to said place at said time for said hearing and shall forward a certified copy of this order to the said Honorable Richard W. Walker, and to the said Honorable Du Val West.

Done at El Paso, Texas, this the 16th day of December, A. D., 1924.

(Signed) Wm. H. Atwell, United States District Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

[Title omitted]

FINAL DECREE—Filed Jan. 15, 1925

The above numbered and entitled cause came on to be heard on this date before the undersigned, Richard W. Walker, United States Circuit Judge for the Fifth Circuit, Du Val West, United States District Judge for the Western District of Texas, and William H. Atwell, United States District Judge for the Northern District of Texas, the parties to said cause being present by their respective attorneys, and said cause was submitted on the pleas of the defendants therein to the jurisdiction of the court and to the venue only, said pleas praying that the same be sustained and that complainants' bill be dismissed; and thereupon, after due consideration, the court being of opinion that the order of the Interstate Commerce Commission sought to be brought into question by the bill in said cause relates to transportation, it is Ordered, Adjudged and Decreed that the said pleas to the jurisdiction and to the venue be, and the same are hereby, sustained; and it is further ordered, adjudged and decreed that the complainants' bill of complaint be, and the same is, dismissed at complainants' cost. And thereupon, in open Court, the plaintiffs' by their attorney, duly excepted to the judgment and ruling of the Court.

Done at New Orleans, Louisiana, this 10th day of January, 1925.

(Signed) Richard W. Walker, United States Circuit Judge.
Du Val West, United States District Judge. Wm. H. Atwell, United States District Judge.

[File endorsement omitted.]

[fol. 61]

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed Feb. 16, 1925

And now, on this 16th day of February, 1925, came the above named plaintiffs, Home Furniture Company, a co-partnership, and George H. Park and James F. Kilcrease individually and as partners in trade, composing the partnership and doing business under the firm name and style of Home Furniture Company, by Jos. U. Sweeney and Edward C. Wade, Jr., their solicitors, and pray an appeal from the final decree of this Court herein to the Supreme Court of the United States, and say that the said final decree in said cause is erroneous and against the just rights of said plaintiffs, for the following reasons:

First. Because the Court erred in holding that the Order of the Interstate Commerce Commission referred to in said decree related to transportation.

Second. Because the Court erred in sustaining the pleas to the jurisdiction and the venue filed by defendants.

Third. Because the Court erred in holding that it had no jurisdiction to proceed with the cause.

Fourth. Because the Court erred in entering the final judgment herein dismissing complainants' bill of complaint.

Wherefore, the complainants' pray that the said final decree of the United States District Court for the Western District of Texas may be corrected and reversed.

(Signed) Jos. U. Sweeney, Jos. U. Sweeney, Edward C. Wade, Jr., Edward C. Wade, Jr., Solicitors for Plaintiffs.

P. O. Address: El Paso, Texas.

[File endorsement omitted.]

[fol. 62]

IN UNITED STATES DISTRICT COURT

PETITION FOR AND ORDER ALLOWING APPEAL—Filed Feb. 25, 1925

The above named plaintiffs, Home Furniture Company, a copartnership, and George H. Park and James F. Kilcrease, individually and as partners in trade, composing the partnership of and doing business under the firm name and style of Home Furniture Company, conceiving themselves aggrieved by the final decree made and entered herein on the 10th day of January, A. D. 1925, dismissing plaintiffs' Bill of Complaint, in the above entitled cause, do hereby appeal from said final decree to the Supreme Court of the United States for the reasons specified in the Assignment of Errors, which is filed herewith, and they pray that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said final decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

(Signed) Jos. U. Sweeney, Edward C. Wade, Jr., Solicitors for Plaintiffs.

Post Office Address: El Paso, Texas.

The above and foregoing application for appeal, coming on to be heard this 18th day of February, A. D. 1925, and the Assignment of Errors of complainants filed in said cause being presented to the Court

with said application for appeal, it is ordered in open court that the said appeal be allowed, as prayed for.

Appeal bond fixed at \$300.00.

(Signed) Du Val West, District Judge, Sitting for the Western District of Texas, El Paso Division. Wm. H. Atwell, U. S. District Judge. R. W. Walker, U. S. Circuit Judge.

[File endorsemet omitted.]

[fol. 63] BOND ON APPEAL FOR \$300—Approved and filed March 4, 1925; omitted in printing

[fols. 64 & 65] CITATION—In usual form showing service on Baker, Botts, et al.; filed March 11, 1925; omitted in printing

[fol. 66] IN UNITED STATES DISTRICT COURT

STIPULATION RE TRANSCRIPT OF RECORD—Filed March 11, 1925

It is hereby stipulated, by and between the above named parties plaintiffs and defendants, acting by and through their respective attorneys of record herein, that the transcript of record in the above styled and numbered cause, for use on appeal to the Supreme Court of the United States, shall include the followings portions of the record, to be incorporated into said transcript and duly authenticated by the Clerk of said Court, that is to say:

Plaintiffs' Bill of Complaint;

Order of Judge Neblett;

Defendants' Pleas to the Jurisdiction;

Opinion of Judge William H. Atwell;

[fol. 67] Order of Judge Atwell setting Pleas to the Jurisdiction for hearing at New Orleans;

Final Decree;

Assignment of Errors;

Petition and Allowance of Appeal;

Cost Bond;

Citation, with admission of Service;

This Stipulation.

(The clerk will omit from the transcript all indorsements except file-marks, all headings, and the map marked exhibit "B").

It is further stipulated and agreed, that the præcipe called for by the first section of Rule Eight and other provisions of law and the Rules of the Supreme Court, indicating the portions of the

record to be incorporated in the transcript of record on appeal, is hereby expressly waived, and this stipulation shall take the place thereof.

At El Paso, Texas, this the 6th day of March, A. D. 1925.
 (Signed) Jos. U. Sweeney, Jos. U. Sweeney, Edward C. Wade, Jr., Edward C. Wade, Jr., Attorneys for Complainants.
 H. R. Gamble, Assistant United States Attorney, for the United States of America and the Interstate Commerce Commission. Baker, Botts, Parker & Garwood, Kemp & Nagle, Attorneys for the Southern Pacific Company. Del. W. Harrington, Attorneys for El Paso and Southwestern Railroad Company.

[File endorsement omitted.]

[fols. 68-71] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

THE UNITED STATES OF AMERICA,
 Western District of Texas, ss:

I, D. H. Hart, Clerk of the United States District Court for the Western District of Texas, hereby certify that the foregoing *on* 67 pages is a true and correct transcript of proceedings had and orders entered in cause No. 146 in Equity, entitled Home Furniture Company, et al., vs. The United States of America, et al., as the same appear on file and of record in this office.

I further certify that the foregoing record embraces only such instruments and orders as are specified in the stipulation filed by the appellants and agreed to by the appellees.

Witness my official signature and the seal of said court hereto affixed at office in the City of El Paso, Texas, this 17th day of March, A. D., 1925.

D. H. Hart, Clerk, by J. N. Phillips Deputy Clerk. (Seal of U. S. District Court, Western District of Texas.)

Endorsed on cover: File No. 30970. W. Texas D. C. U. S. Term No. 324. Home Furniture Company, George H. Park, and James F. Kilcrease, etc., appellants, vs. The United States of America, The Interstate Commerce Commission, The Southern Pacific Company, et al. Filed March 21, 1925. File No. 30,970.